(2) Supreme Court, U.S.
FILED

No. 06-764 NOV 27 2006

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

EDWARD FREDERICK,
Petitioner,

v.

STATE OF FLORIDA
Respondent.

On Petition for a Writ of Certiorari to the
District Court of Florida, Fourth District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether state courts may apply the common law birthday rule to some defendants, granting them relief on their convictions and prison sentences, while refusing to apply it to other defendants in similar situations, denying them relief, or does such violate the Fourteenth Amendment rights to due process and equal treatment under the law, and more specifically, were Petitioner's constitutional rights violated by the decision of the court of appeals to affirm the trial court's refusal to apply the common law birthday rule to Petitioner's case where Petitioner argued his victim was 12 years old on her 12th birthday, such entitling him to a lesser sentence, when that same court of appeals has reversed similar cases by applying the common law birthday rule?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

CORPORATE DISCLOSURE

No corporations or subsidiaries are involved here.

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OTHER AUTHORITY:

J. Story, *Commentaries on the Constitution of the United States* §1783, p. 661 (1833) 11

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OPINIONS BELOW

The decision of the District Court of Appeal, Fourth District of Florida, of July 19, 2006 (Pet. App. E) to affirm the opinion of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida issued on October 20, 2005 (Pet. App. A).

JURISDICTION

The opinion of the Circuit Court, of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida was entered October 20, 2005. (Pet. App. A). The order of the District Court of Appeals, Fourth District of Florida, affirming that decision was entered July 19, 2006. (Pet. App. E). A motion for rehearing was denied on August 28, 2006. (Pet. App. G). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL:

The Fifth Amendment to the United States Constitution (in pertinent part) – "[no] person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

The Fourteenth Amendment to the United States Constitution (in pertinent part) – "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens...nor deprive any person of life, liberty, or property, without due process of law; nor deny...equal protection of the laws."

STATE:

Florida Statute 2.01, (1829 to date) – The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the 4th day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the Constitution and laws

of the United States and the acts of the Legislature of this state.

STATEMENT OF THE CASE

In a seven count Information, Petitioner was charged with two counts of sexual battery and five counts of lewd assault, the lone victim being the Petitioner's minor stepdaughter. On October 6, 1999, after a trial by jury, Petitioner was convicted, "as charged in the Information," on counts 1, 2, 3, 5, and 7, and acquitted on counts 4 and 6. Petitioner was sentenced on counts 1 and 2 to life in prison with a mandatory minimum 25 years, and on counts 3, 5, and 7, to 15 years each count, all sentences running concurrent. (Pet. App. H)

Petitioner filed a timely appeal and on August 9, 2002, as a result of that appeal, he was resentenced, his life sentences on counts 1 and 2 remaining the same, but receiving 67½ months on count 3, and 4½ years on each of counts 5 and 7, all sentences to run concurrent. (Pet. App. H)

On counts 1 and 2, the Information charged Petitioner with committing upon, "a person less than twelve years of age," acts defined in 794.011(1)(h),[1] the offense dates being alleged in the Information as, "on or between December 31, 1991 and September 27, 1995," for count 1, and "on or between January 1, 1993 and September 27, 1995," for count 2. Counts 3 and 4 charged Petitioner with the identical behavior, but alleged they occurred, "on or between September 27, 1995 and May 31, 1997." September 27, 1995, was the victim's 12th birthday. (Pet. App. H)

The penalties for the behavior alleged in counts 1, 2, 3 and 4 depend on whether the victim was "under 12" or "12 or older," and because the range of dates alleged included the victim's 12th birthday, it is essential to this

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[1] These acts may or may not be sexual battery depending on a combination of other factors such as age and consent of victim.

case to know precisely when the alleged victim became 12 according to the law.

On or about March 17, 2005, Petitioner filed a motion to address the issue of the victim's age, arguing that the victim was in fact 12 years old on her 12th birthday, citing the common law birthday rule in support. (Pet. App. H) The trial court denied Petitioner's motion on October 20, 2005 (Pet. App. A). Petitioner filed a Motion for Clarification and/or Rehearing on or about November 5, 2005 (Pet. App. B), which was denied on December 12, 2005 (Pet. App. C).

Petitioner appealed the trial court's decision, filing his Initial Brief on May 19, 2006. (Pet. App. D) The court of appeal affirmed the decision below on July 19, 2006. (Pet. App. E). On August 3, 2006, Petitioner filed a Motion for Rehearing, Motion for Rehearing En Banc, Motion for Issuance of a Written Opinion, and Motion for Certification of Questions of Great Public Importance (Pet. App. F), which were all denied on August 28, 2006 (Pet. App. G). Without a written opinion, Petitioner could not appeal the decision to the Florida Supreme Court, making the United States Supreme Court his court of last resort.

Petitioner, who is serving his sentences in the custody of the Florida Department of Corrections, filed his Writ for Petition of Certiorari to the United States Supreme Court on November 27, 2006 (November 26th being a Sunday).

REASONS FOR GRANTING THE WRIT

The decision of the District Court of Appeal, Fourth District of Florida, if allowed to stand, will impair the effective administration of justice, because it sets a precedent that either the common law no longer controls, or alternately, if the common law does still control, fair and just reviews by the appellate courts, as well as the highest Court in this land, no longer exist, creating an unjustifiable risk that defendants who are either not guilty or who received excessively harsh sentences, have no recourse towards obtaining justice and addressing the

errors in their cases. Granting this writ would also allow this Court to take a stand recognizing either the common law or birthday rule to establishing a bright line rule as to when a person attains age in this country, an issue that is relevant in so many legal situations where rights are based on age. This Court should therefore grant certiorari to review the July 19, 2006 decision of the District Court of Appeal, Fourth District of Florida, which affirmed the October 20, 2005 decision of the Circuit Court of the Fifteenth Judicial Circuit of Florida, in and for Palm Beach County, as well as the referenced decision of the trial court.

ARGUMENT

Petitioner was charged by Information in counts 1 and 2 of his case with specific behavior involving a minor. The penalties defined for this behavior are greater when the victim is under 12 years of age than when the victim is 12 or older. The State alleged the behavior took place, "on or between December 31, 1991 and September 27, 1995," in count 1, and, "on or between January 1, 1993 and September 27, 1995," in count 2. September 27, 1995 was the victim's 12th birthday. The jury was not instructed as to when a person becomes 12 years of age in relation to his or her 12th birthday. The jury found Petitioner, "Guilty as charged in the Information," on both counts 1 and 2. The penalty for such offensive behavior is automatic life in prison when the victim is under 12 years of age, and a maximum of 15 years when the victim is 12 or older. Thus, the age of Petitioner's victim is controlling as to the length of sentence Petitioner may be given and because the victim's 12th birthday is included in the range of dates alleged by the State as to when these offenses took place, critical to Petitioner's argument for relief is the determination of how the laws of the land define precisely when his victim became 12 years old in relation to her 12th birthday. If she was 12 on her birthday, then he is entitled to relief. If she was not, then his life sentences are proper.

The question as to when a person attains age in regards to his or her birthday is examined in detail in *Velazquez v. State,* 648 So.2d 302 (Fla. 5th DCA 1995), a case not unsimilar to the case at bar. The *Velazquez* court stated:

> Chapter 794 of the Florida Statutes fails to define who is "a person less than 12 years of age" under section 794.011(2), however, section 2.01, Florida Statutes (1991), provides that the general common and statute laws of England in existence on July 4, 1776, remain in force in this state unless inconsistent with the Constitution and laws of the United States or with the acts of the Florida legislature.

Id.

The *Velazquez* court discussed in depth the common law for calculating ages and the more readily accepted "birthday rule." Neither rule recognizes fractions of a day. The common law holds that a person attains a given age at 12:01AM on the day before the anniversary of the person's birthday where the birthday rule holds that the person attains a given age at 12:01AM on the anniversary of the person's birthday. *Id.* (Pet. App. I). According to either rule, the victim in the case at bar was 12 years of age throughout the day of September 27, 1995 and therefore the range of dates during which counts 1 and 2 were alleged to have happen, includes a period of time when the victim was 12 years of age rather than "under the age of 12." This entitled Petitioner to relief.

Florida statute provides that general English common law is the law of Florida unless it is inconsistent with federal law or Florida's statutes. This became part of the laws of Florida sixteen years before Florida became a state. It is codified in Section 2.01, Florida Statutes (1829 to date), which provides that the general common and statute laws of England in existence on July 4, 1776, remain in force in Florida unless inconsistent with the Constitution and laws of the United

States or with the acts of the Florida legislature. *See In re Forfeiture of 1978 Chevrolet Van,* 493 So.2d 433, 436-37 (Fla. 1986). Florida has no statute that specifically addresses when a person acquires his or her new age in relation to the birthday anniversary, and therefore the common law controls. According to the common law, fractions of a day are not recognized as far as one's age goes, and therefore, a person acquires his or her new age the moment the day that is the anniversary of the birthday begins, that is 12:01AM on the morning of the birthday.

In *Velazquez,* the defendant was charged with two counts of capital sexual battery occurring on June 5, 1992. The state presented evidence that the victim was born at 3:49PM on June 5, 1992, and the alleged capital sexual batteries occurred "around noon or one o'clock" on that date and thus the victim was under 12. Based on that evidence, the jury found Velazquez guilty. On appeal, Velazquez's two capital sexual battery convictions were overturned because when "the common law" rule was used to define when the victim turned 12, the information and jury's verdict did not make a showing of the offensive behavior occurring conclusively when the victim was "under 12."

Velazquez is on point with the case at bar, where the offensive behavior alleged in counts 1 and 2 is capital sexual battery only when the victim is under the age of 12[2] and is a second degree felony when the victim is 12 or older, but under 16.[3]

Just like in *Velazquez,* in the case at bar, the Information and verdict form for counts 1 and 2 identified the crimes charged as sexual battery on a person under the age of 12, and the jury instructions included that it must be found that the victim was under the age of 12 at the time. Also just like in *Velazquez,*

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[2] See 794.011(2)(a), Fla. Stat., (1991, 1993)

[3] See 800.04(3), Fla. Stat., (1991, 1993)

the jury was not instructed as to how to calculate when a victim turns 12 according to Florida law, and is no longer "under 12." The jury in the case at bar, like in *Velazquez*, returned a verdict of "guilty as charged in the Information." Applying the holding in *Velazquez* to the case at bar, it cannot be concluded that the offensive behavior the jury found Petitioner "guilty as charged in the Information," of doing didn't occur on September 27, 1995, a time during the range of dates alleged when the victim was 12, not "under 12," and therefore it must be presumed that it did occur on that date, when the victim was 12.

Another Florida case on point is *Griffith v. State,* 654 So.2d 936 (Fla. 4th DCA 1995), *quashed on other grounds,* 675 So.2d 911 (Fla. 1996), which held that in cases where the jury verdict isn't clear as to an age relevant as to the penalty involved, the rule of lenity controls.[4] The Fourth District Court of Appeal in *Griffith,* held:

> The facts in this case are simple, defendant was born 25 August 1967. On 15 December 1989, he was charged by Information with 14 felonies: 10 counts of sexual battery and 4 counts of lewd assault. The Information alleged that all of the violations occurred "on one or more occasions between" 2 August 1983 and 1 August 1985. The jury convicted him of 3 counts of sexual battery and 2 counts of lewd assault. The verdict adds for each conviction "as charged in the Information" but it does not specify the dates of the occurrences for the convictions. Informed by the rule of lenity, we are required by the particular language employed in the Verdict and the Information to as-

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[4] Florida's "rule of lenity" is contained in 775.021, Fla. Stat. (1974 to date). The United States recognized the "rule of lenity," in *Bell v. United States,* 349 U.S. 81, 75 S. Ct. 620, 99 L. Ed. 905 (1955)

> sume that all of the convictions represented violations that occurred while the defendant was under the age of 16.

Id. (internal footnotes omitted)

Because the penalty for the offenses in *Griffith,* was greater for an adult than it was for a juvenile, the question became, like in the case at bar, which penalty would apply and it was held that because Griffith was found guilty "as charged in the Information," what was contained in the Information must be interpreted using the rule of lenity. When the holding in *Griffith* is applied to the case at bar, a presumption must me made that the victim was not "a person less than 12 years of age," but one who had already turned 12.

Petitioner attempted to show the lower courts that in accordance with the laws of Florida and the United States through recognition of the common law in absence of statutes to the contrary, his victim was 12 years of age during a portion of the time frame the jury found the criminal behavior to have occurred according to its verdict in counts 1 and 2, and Florida law holds that in such situations, the rule of lenity requires Petitioner be sentenced to no more than 15 years each on counts 1 and 2, instead of the life sentences he received. He was thwarted in this attempt by the trial court's refusal to apply the rule set forth in *Velazquez*, that is the common law birthday rule. The court stated the facts of the two cases are distinguishable but offered no explanation as to what distinguishing facts would result in Petitioner's victim not turning 12 on her 12th birthday. The cases are distinguishable as to the facts, but are not as to the application of the point of law. In both cases, the application of the common law birthday rule results in the victim being 12 years old during the time period alleged by the State as to when the crimes took place, and that in such situations, relief is due.

By refusing to apply the common law birthday rule in Petitioner's case, the trial court avoided addressing Petitioner's claim that his victim was indeed 12 years old at some time during the time period the

jury's verdict defined as to when the alleged offenses occurred, and as such, according to Florida law, as well as Constitutional law, Petitioner must be given the benefit of the doubt and sentenced under the more favorable sentencing scenario of the victim being 12 rather than under 12.

Petitioner appealed the trial court's decision and the District Court of Appeal, Fourth District of Florida, affirmed the trial court's refusal to apply the birthday rule. The courts of Florida have applied the common law birthday rule to other cases, for example, *Velazquez*, granting various defendant's relief in situations similar to Petitioner's and Petitioner contends the courts' failure to do so in his case is a violation of his Constitutional right to due process and equal treatment under the law.

Petitioner's right to equal treatment under the law comes from the Fourteenth Amendment to the Constitution. In 1868, the Equal Protection Clause was added to the Fourteenth Amendment, creating specific protections against unequal treatment by state governments.

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Equal Protection Clause was crafted after the War Between the States in order to give the newly freed slaves legal protection. But it was specifically worded to provide protection of the rights of all "persons." It was used during the civil rights battles of fifty years ago and has even been used in the defense of the rights of non-citizens.

Although the Fourteenth Amendment specifically prohibits states from denying citizens equal protection of the laws it says nothing about the federal government.

This Court addressed this fifty-two years ago in *Bolling v. Sharpe,* 347 U.S. 497 (1954). *Bolling* was a case linked to a group of four other cases that went before the U.S. Supreme court as one of the landmark *Brown v. Board of Education*[5] cases, which overturned *Plessy v. Ferguson.*[6] *Bolling* differed from the other cases subsumed under *Brown,* which argued that school segregation violated the equal protection clause of the Fourteenth Amendment, because Blacks residing in Washington D. C., could not use the Fourteenth Amendment because it prohibited *states* from denying citizens equal protection of the laws but not *the federal government.* In *Bolling*, this Court ruled that discrimination can be "so unjustifiable as to be violative of due process" and that segregation in the District of Columbia was such a case. This Court held that the Fifth Amendment's guarantee of due process extends the Court's ruling regarding states to the federal government. It's opinion clearly said as much:

> "In view of our decision that the Constitution prohibits it's states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."

Bolling, 347 U.S. at 500

The Fifth Amendment provides that "[no] person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." Since *Bolling*, this Court has issued numerous decisions holding that the Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws. *E.g., Hampton v. Mow Sun Wong,* 426 U.S. 88, 100 (1976); *Buckley v. Valeo,* 424 U.S. 1, 93 (1976); *Weinberger v. Wiesenfeld,* 420 U.S. 636, 638 n. 2 (1975).

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[5] *Brown v. Board of Education,* 347 U.S. 483 (1954)

[6] *Plessy v. Ferguson,* 163 U.S. 537 (1896)

The Due Process Clause of the Fifth Amendment, as understood when our country was founded and since, is to force the Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property. J. Story, *Commentaries on the Constitution of the United States* §1783, p. 661 (1833)(equating "due process of law" with "due presentment or indictment, and being brought in to answer thereto by due process of the common law"). The Due Process Clause "in effect affirms the right of trial according to the process and proceedings of the common law." *Id.* The "Common Law Of England" is in full force today, where there is no existing law that contradicts same, or when it is not in opposition to the U.S. or State Constitution or otherwise prohibited. West's Florida Digest 2d, Volume 5. As such, Petitioner has a due process right to have the State of Florida and its courts apply the common law method of calculating ages to his case in determining what penalty applies to his conviction for certain behavior during a specific time period.

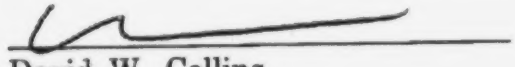
Petitioner therefore has a constitutionally protected right to due process and equal treatment under the law and both the trial court and the appellate court in Florida denied him these rights in refusing to apply the common law birthday rule to his case, and address the fact that his victim was in fact 12 years of age during a portion of the time the State alleged the crimes took place, a fact that would entitle him to sentences of no more than 15 years, rather than the life sentences he is currently serving. He thus has been prejudiced by this violation of his constitutional rights and this court is his last resort towards overcoming the State of Florida's refusal to abide by the common law and address the fact that under the common law, the age of his victim requires he be granted relief.

CONCLUSION

Petitioner has shown that the State of Florida may not apply the common law birthday rule to some

defendants, granting them relief on their convictions and prison sentences, and refuse to apply it to other defendants in similar situations, without violating the Fourteenth Amendment rights to due process and equal treatment under the law. Petitioner has further shown that according to the common law of England, his victim was 12 years old during a portion of the time period the State alleged the crimes in his counts 1 and 2 occurred and he is therefore entitled to more favorable sentencing, and the trial court's refusal to apply the common law birthday rule to his case, and the court of appeals' order affirming that decision have denied him of his Constitutional rights to due process and equal treatment under the law, and it is an issue of great public importance that this Court answer Petitioner's question. This Court should therefore grant certiorari to review the July 19, 2006 decision of the District Court of Appeal, Fourth District of Florida, which affirmed the October 20, 2005 decision of the Circuit Court of the Fifteenth Judicial Circuit of Florida, in and for Palm Beach County, as well as the referenced decision of the trial court.

Respectfully submitted,



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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

FILED
OCT 20, 2005

CRIMINAL DIVISION "T"

CASE NO. 98-9283CF A02

STATE OF FLORIDA,
Plaintiff(s),

vs.

EDWARD FREDERICK,
Defendant(s)

ORDER DENYING DEFENDANT'S MOTION TO CORRECT ILLEGAL SENTENCE AND ERRORS IN SCORESHEET CALCULATIONS

THIS CAUSE, came before the Court, in chambers, upon Defendant's Motion to Correct Illegal Sentence and Errors in Scoresheet Calculations. The Defense argues that Velazquez v. State, 648 So.2d 302 (Fla. 5th DCA 1995) is analogous to the case at bar. In Velasquez the capital sexual battery was alleged to have occurred on the victim's actual birthday. Here, the information alleges the offense date as "on or between December 31, 1991 and September 27, 1995" for count 1, and "on or between January 1, 1993 and September 27, 1995" for count 2. In each of these counts, the jury specifically found that the Defendant was guilty of sexual battery on a person less than 12 years of age. The jury returned a verdict of not guilty as to Count III and IV, as such.

This Court will not apply the rule set forth in Velasquez as the facts are clearly distinguishable here. Therefore, it is

ORDERED AND ADJUDGED that the Court has reviewed the Motion, the relevant case law and denies Defendant's Motion.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 20 day of October, 2005.

/s/
KRISTA MARX
Circuit Court Judge

copies furnished:
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David Collins, Esq., 310 North Jefferson Street, Monticello, FL 32345

at/101905

IN THE CIRCUIT COURT OF
THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

EDWARD FREDERICK
Defendant

FILED
NOV 5, 2005

~ vs ~

Case No. 98-9283-CFA02
Palm Beach County

STATE OF FLORIDA
Plaintiff

MOTION FOR CLARIFICATION AND/OR REHEARING ON MOTION TO CORRECT ILLEGAL SENTENCE AND ERRORS IN SCORESHEET CALCULATIONS

COMES NOW Defendant, Edward Frederick, by and through his undersigned counsel, and pursuant to Florida Rules of Criminal Procedure 3.800(b)(1)(B), files this, his *Motion for Rehearing and/or Reconsideration on Motion To Correct Illegal Sentence and Errors in Scoresheet Calculations* as he believes there are matters of fact and/or law which the Court may have overlooked in arriving at its decision of October 20, 2005, and in support states as follows:

This Court stated in its Order, "This Court will not apply the rule set forth in *Valesquez* [*v. State,* 648 So.2d 302 (Fla. 5th DCA)] as the facts are clearly distinguishable here." The Court did not offer any further comments to guide the Defendant as to its thinking in making this statement.

Valesquez actually references two rules, the "common-law rule" and the "birthday rule," in explaining how the courts in this country have come to hold when a person

attains his or her new age in relation to the birthday anniversary date [hereafter "birthday"].

Under the "common-law rule" a person reaches a given age at the earliest moment of the day before the person's birthday.

Under the "birthday rule" a person attains a given age at 12:01AM or at the beginning of the person's birthday.

Under either rule, Defendant's victim would have been 12 years old on her 12th birthday, September 27, 1995. This Court, in deciding "not apply the rule set forth in *Valesquez*," would be saying that Defendant's victim was still 11 years old on her 12th birthday and Defendant believes this Court misread *Valesquez* since a holding that people do not attain their new age until the day *after* their birthday instead of on their birthday is not supported by any authority he can find. Defendant would point out that the State of Florida requires a person to be 16 years of age in order to get a drivers license and such licenses are routinely issued to people on their 16th birthdays without requiring them to wait until the day after their birthday. The same applies for people registering to vote, being able to drink alcoholic beverages legally and join the military.

Should this Court agree that Defendant's victim was in fact 12 years of age on her 12th birthday, then his case becomes a direct parallel to the case in *Valesquez*, and Defendant would bring to the Court's attention the following relevant points:

1) In both cases, the Information charged sexual battery on a child under the age of 12.

2) In both cases, the time frame alleged for when the crime occurred included the victim's 12th birthday.

3) In both cases, the juries returned a verdict of "Guilty as Charged in the Information."

The only difference is that the time period defined in the Defendant's case included other dates when the victim was indeed under the age of 12, but as Defendant

pointed out in his motion, in such cases the rule of lenity must be applied and requires the date most favorable to the Defendant to be used. When that is done, Defendant's counts 1 and 2 must be considered to have occurred on the victim's 12th birthday which makes Defendant's case exactly like the case in *Vasequez*.

Defendant would also point out that this Court stated in its Order, "The jury returned a verdict of not guilty as to Count III and IV." This is incorrect. Defendant was found not guilty on Count IV, but guilty on Count III.

For the above reasons, Defendant requests this Honorable Court to either rehear this cause in light of the above, or clarify its written order, including the authority upon which it relied in determining that "the birthday rule" and/or "the rule of lenity" do not apply.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *Motion for Clarification and/or Rehearing on Motion to Correct Illegal Sentence and Errors in Scoresheet Calculations*, has been furnished by U.S. Mail delivery this 3rd day of November, 2005 to: Office of the State Attorney, 401 North Dixie Highway, West Palm Beach, Florida 33401

/s/
DAVID W. COLLINS, Esquire
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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

FILED
DEC 12, 2005

CRIMINAL DIVISION "T"

CASE NO. 98-9283CF A02

STATE OF FLORIDA,
Plaintiff(s),

vs.

EDWARD FREDERICK,
Defendant(s)

ORDER DENYING DEFENDANT'S MOTION FOR CLARIFICATION AND/OR REHEARING ON MOTION TO CORRECT ILLEGAL SENTENCE AND ERRORS IN SCORESHEET CALCULATIONS

THIS CAUSE, came before the Court, in chambers, upon Defendant's Motion for Clarification and/or Rehearing on Motion to Correct Illegal Sentence and Errors in Scoresheet Calculations. Based on the foregoing and upon review of the Court file, it is

ORDERED AND ADJUDGED that Defendant's motion is denied with the exception that the scriveners error indicating that a not guilty verdict was returned on Count III is eliminated from the original order.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ____ day of December, 2005.

SIGNED AND DATED
DEC 12 2005
JUDGE KRISTA MARX

/s/
KRISTA MARX
Circuit Court Judge

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IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT, FLORIDA

FILED
MAY 9, 2006

EDWARD FREDERICK,
Appellant

vs.

Case No. 4D06-2061

STATE OF FLORIDA,
Appellee

INITIAL BRIEF OF APPELLANT
APPEAL FROM SUMMARY DENIAL
OF 3.800 MOTION

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PRELIMINARY STATEMENT

Appellant will be referred as Appellant; the State will be referred to as the State; other parties will be referred to by name or position relevant to the case.

The record on appeal, in accordance with Florida Rule of Appellate Procedure 9.141(b)(2)(A), should include the documents listed below and will be referenced by document name and page as relevant.[1]

- Appellant's rule 3.800 *Motion to Correct Illegal Sentence and Errors in Scoresheet Calculations,* filed on or about March 17, 2005 (hereafter, Appellant's motion)
- The Court's Order of October 20, 2005
- Appellant's *Motion for Clarification and/or Rehearing,* [filed November 4, 2005]
- The Court's Order [on the *Motion for Clarification and/or Rehearing,*] of December 12, 2005

STATEMENT OF THE CASE AND FACTS

The statement of the case and facts as presented in Appellant's motion (pages 1-2), and uncontested by the trial court are as follows: In a seven-count Information, Appellant was charged with two counts of sexual battery and five counts of lewd assault, the lone victim being the Appellant's minor stepdaughter. On October 6, 1999, after a trial by jury, Appellant was convicted "as charged in the Information" on counts 1, 2, 3, 5, and 7, and acquitted on counts 4 and 6. Appellant was sentenced on counts 1 and 2 to life in prison with a mandatory minimum 25 years, and on counts 3, 5, and 7, to 15

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[1] Florida Rules of Appellate Procedure 9.141(b)(2)(C), requires Appellant to file his Initial Brief within 15 days of filing his notice of appeal and thus before the record has been finalized by the clerk of the lower court and submitted.

years, all sentences running concurrent. Appellant filed a timely appeal and on August 9, 2002, as a result of that appeal, was resentenced, his life sentences on counts 1 and 2 remaining the same, but receiving 67½ months on count 3, and 4½ years on each of counts 5, and 7, all concurrent with each other and the sentences on counts 1 and 2.

On counts 1 and 2, the Information charged Appellant with committing upon "a person less than twelve years of age," acts defined in 794.011(1)(h), the offense dates being alleged in the Information as "on or between December 31, 1991 and September 27, 1995," for count 1, and "on or between January 1, 1993 and September 27, 1995" for count 2. Counts 3 and 4 charged Appellant with the identical behavior, but alleging the occurrences as "on or between September 27, 1995 and May 31, 1997." September 27, 1995, was the victim's 12th birthday.

The penalties for the behavior alleged in counts 1, 2, 3 and 4 depend on whether the victim was under 12 or 12 or older when the behavior occurred. If the victim was under 12 on her 12th birthday, Appellant's life sentences on counts 1 and 2 are legal. If the victim was 12 on her 12th birthday, then his sentences on counts 1 and 2 exceed the statutory maximum of 15 years for second degree felonies and he would be entitled to relief.

SUMMARY OF THE ARGUMENTS

The facts of this case were not in contention and therefore the issue was the application of law to the facts of the case. In such a situation, the Florida Supreme Court has held that the trial court is required to include in its denial its rationale in making its decision. The trial court failed to do this, saying only that the rule Appellant referenced in a case explaining how the common law defines when a person attains his or her new age in relation to his or her birthday, did

not apply to his case. In his Argument I, Appellant argues that the trial court's failure to provide its rationale in arriving at its decision that the common law birthday rule did not apply to Appellant's victim was contrary to the holding of the supreme court requiring the court to provide such rationale. Appellant further argues the absence of that rationale denies him the ability of a fair review in the appellate court by depriving him of the ability to present in his brief errors he contends is contained in the trial court's rationale. The trial court's denial should therefore be reversed and remanded back to the trial court to either grant relief or deny relief with the inclusion of its rationale.

In his Argument II, Appellant argues that because the facts of the case are not in contention, and the laws applicable not complicated, this Court can, for the sake of judicial efficiency, review the facts and apply the law without remanding to the trial court for issuance of a decision containing rationale. Appellant contends that this Court's review will show that the range of dates the State used for Counts 1 and 2, includes times when the victim was both "12 years old" and "under the age of 12," and because the jury found Appellant guilty, "as charged in the Information," both the rule of lenity[2] and the United State's decision in *Apprendi v. New Jersey,* 530 U.S. 466 (2000), control, requiring the judge to decide in the Appellant's favor by presuming the victim was 12 years of age instead of "under 12 years of age," and sentence him accordingly. Appellant's life sentence is therefore excessive and Appellant should be resentenced to no more than 15 years on Counts 1 and 2.

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[2] See 775.021, Fla. Stat. (1993); *Bell v. United States,* 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955)

ARGUMENT I

Because the facts of the case are not in contention and the only issue is the application of law to the facts, the trial court's denial is procedurally defective in that it fails to "state its rationale in its decision" in accordance with *Mclin v. State*, 827 So.2d 948 (Fla. 2002).

STANDARD OF REVIEW

Florida Rule of Appellate Procedure 9.141(b)(2)(D), governs review of a trial court's summary denial of claims under Florida Rule of Criminal Procedure 3.800(a), and states, "unless the record shows conclusively that the appellant is entitled to no relief, the order shall be reversed and the cause remanded for an evidentiary hearing or other appropriate relief."

"To support summary denial without a hearing, a trial court must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion." *Mclin v. State*, 827 So.2d 948 (Fla. 2002), citing *Anderson v. State*, 627 So.2d 1170, 1171 (Fla. 1993).

The standard of review in an appeal of an order denying a Rule 3.800(a) motion is whether the trial court abused its discretion in denying the relief requested. *Dowling v. State*, 545 So.2d 521 (Fla. 5th DCA 1989); *See also Denson v. State*, 711 So.2d 1225, 1230 (Fla. 2d DCA 1998)(Under the constitutional separation of powers, the legislature cannot restrict our scope or standard of review in an unreasonable manner that eliminates our judicial discretion to correct "illegal sentences and other serious, patent sentencing errors.")

The standard of review for a ruling involving a pure issue of law is *de novo*.
Jupiter v. State, 833 So.2d 169 (Fla. 1st DCA 2002), citing *Rittman v. Allstate Ins. Co.*, 727 So.2d 391, 393

(Fla. 1st DCA 1999).

MERITS

In his motion, Appellant presented two arguments in support of relief, both based on his victim being 12 years old (versus "under 12") during part of the time frame the State alleged Counts 1 and 2 occurred. The contention that the victim was 12 during part of the range of dates for Counts 1 and 2 was based on the State's inclusion of the victim's 12th birthday in that range and Appellant argued that the victim was 12 on her 12th birthday, and cited *Velazquez v. State,* 648 So.2d 302 (Fla. 5th DCA 1995) in support. *Velazquez* is a case where the precise moment a person attains his or her new age in relation to that person's birthday was an issue and the court included an in depth analysis of when a person legally attains a new age in relation to the birthday anniversary.

The trial court denied Appellant's motion saying only that it would "not apply the rule set forth in *Velazquez* as the facts are clearly distinguishable here." (Trial court's Order of October 20, 2005). If the rule in *Velaquezi* does not apply, then the victim in Appellant's case would still have been "under the age of 12" on her 12th birthday and neither of his two arguments for relief would have any relevancy. Because the trial court presented no rationale as to how it arrived at its decision, Appellant filed a timely motion for clarification requesting the court's rationale in arriving at its decision. (See Appellant's *Motion for Clarification and/or Rehearing*). The trial court denied that also without providing any rationale behind its decision. (See trial court's Order of December 12, 2005.)

According to the Supreme Court in *Mclin v. State,* 827 So.2d 948 (Fla. 2002), a trial court denying a 3.800(a), must "either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion" The facts in the

case were not in contention so the trial court was required to "state its rationale in coming to its decision," which it did not do.

An appeal is an adversarial proceeding. When a trial court fails to provide its rationale behind its decision, the defendant is denied the ability to attack the correctness of that rationale and his right to have the appellate court review the trial court's rationale and Appellant's arguments relevant to it as to error.

Appellant contends he is entitled to have the trial court's denial reversed and remanded back to the trial court with instructions to either grant Appellant the relief he seeks, or deny said relief with inclusion in the order the court's rational in applying the law to the facts of the case. Appellant would prefer, and it would be more judicially efficient, if this Court could apply the law to the facts of this case and make a decision without remanding it back to the trial court and towards that end, Appellant presents elsewhere in this brief (see Argument II), his argument that regardless of the trial court's rationale, there exists no valid argument that the victim in this case was "under 12 years of age" on her 12th birthday, and accordingly, applying the rule of leniency and/or the holding of U.S. Supreme Court in *Apprendi* result in Appellant be entitled to relief.

ARGUMENT II

The victim was 12 years old on her 12th birthday according to the "common law rule" and the "birthday rule" explained in *Velazquez v. State*, 648 So.2d 302 (Fla. 5th DCA 1995) and the trial court erred in holding that "the rule does not apply."

STANDARD OF REVIEW

Same as Argument I.

MERITS

Appellant was charged and convicted in Counts 1 and 2 of alleged sex acts against the victim during time periods that included September 27, 1995, the victim's 12th birthday. The penalties for these acts is life in prison if the victim is "under the age of 12," but no more than 15 years if the victim is 12 years old. Appellant received life in prison.

Appellant presented two arguments in his 3.800(a) to show that the sentencing judge was required by law to presume the victim was 12, not under 12, due to the "rule of lenity," as well as the U.S. Supreme Court's holding in *Apprendi v. New Jersey,* 530 U.S. 466 (2000).

Appellant cited *Velazquez v. State,* 648 So.2d 302 (Fla. 5th DCA 1995) to show that according to the law of the land, the victim would indeed have been 12 years old on her 12th birthday. *Velaquez* cited two rules, both based on common law. The trial court, however, held that the "rule" in *Velazquez* did not apply, and thus avoided conceding that the victim was 12 on her 12th birthday, and without that concession, neither the rule of lenity argument nor the *Apprendi* argument had any relevance and the trial court addressed neither.

The two rules referenced in *Velazquez* are "the common law rule" and "the birthday rule" which the courts of this country have embraced. Under either rule, the victim in the case at bar would have been 12 on September 27, 1995, her 12th birthday.

Velazquez points out that neither Florida nor the United States of America has enacted legislation defining when a person attains his or her new age in relation to a birthday anniversary (hereafter, "birthday") and therefore common law controls since both the Florida Constitution and federal Constitution hold that common law controls in the absence of legislation enacted

addressing the issue.

As a citizen of Florida, the victim in this case would have been 12 on her 12th birthday in accordance to the common law due to the Florida Constitution and its statutes. The common law of England in effect on July 4, 1776, was adopted as the law of Florida and declared to be of full force and effect in this state by the Act of November 6, 1829, § 1 (Comp.Gen.Laws 1927 § 87). This was done by statute and such adoption has been held to have been legal and binding and of full force and effect for more than one hundred years. *State v. Egan,* 287 So.2d 1 (Fla. 1973); Florida Statute 2.01 (1829 to present)(The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the 4th day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state.); Florida Statute 775.01 (1829 to present)("The common law of England in relation to crimes, except so far as the same relates to the modes and degrees of punishment, shall be of full force in this state where there is no existing provision by statute on the subject.")

The victim in this case would have also been deemed 12 on her 12th birthday as a citizen of the United States as well, because again, according to the federal Constitution, common law controls in the absence of legislation to the contrary. It is common sense and not merely the blessing of the Framers of the Constitution that explains the United States Supreme Court's frequent reminders that: "The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history." *Smith v. Alabama,* 124 U.S. 465, 478 (1888). This proposition was again put forward by Justice Gray

speaking for the Court in *United States v. Wong Kim Ark,* 169 U.S. 649 (1898), where the Court was called upon to define the term "citizen" as used in the Constitution. "The Constitution nowhere defines the meaning of these words [the Citizenship Clause]. . . . In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution." 169 U.S., at 654. History continues to be a wellspring of constitutional interpretation. Indeed, history was even invoked by the Supreme Court in such decisions as *Townsend v. Sain,* 372 U.S. 293 (1963), and *Fay v. Noia,* 372 U.S. 391 (1963), where it purported to interpret the constitutional provision for habeas corpus according to the "historic conception of the writ" and took note that the guarantee was one rooted in common law and should be so interpreted. *Cf. United States v. Brown,* 381 U.S. 437, 458 (1965). In accordance with these precepts, sound constitutional interpretation dictates that a decision that the victim in the case at bar was not 12 years old on September 27, 1995, her 12th birthday, would be contrary to the common law and thus violate Appellant's rights under the federal Constitution.

The significance of Appellant's argument that the victim in this case was 12 on her 12th birthday is because the range of dates the State used for Counts 1 and 2 in the Information included times when the victim was "under the age of 12" (before her 12th birthday), and times when she was 12 (her 12th birthday, September 27, 1995). The jury found Appellant "guilty as charged in the information." As Appellant argued to the trial court below, in such situations, both the rule of lenity and the supreme court's decision in *Apprendi* do not allow a judge to legally choose to give the harsher sentence.

Application of the rule of lenity in issues of age is recognized not only within the State of Florida, but by the United States Supreme Court. *See e.g. Clark v.*

Martinez, 125 S.Ct. 716, 160 L.Ed.2d 734 (U.S. 1/12/2005)(if a statute has criminal applications, "the rule of lenity applies" to the Court's interpretation of the statute); *Thompson v. Oklahoma,* 108 S. Ct. 2687, 487 U.S. 815 (U.S. 1988) (We granted certiorari to consider whether a sentence of death is cruel and unusual punishment for a crime committed by a 15-year-old child, . . . the plurality pronounces it to be a fundamental principle of our society that no one who is as little as one day short of his 16th birthday can have sufficient maturity and moral responsibility to be subjected to capital punishment for any crime.); *Roper v. Simmons,* 125 S.Ct. 1183 (U.S. 03/01/2005)(Held: The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed. . . . The Court's decision today establishes a categorical rule forbidding the execution of any offender for any crime committed before his 18th birthday.) In the above cases, the courts have held that the benefits or penalties applicable when a person attains their new age go into effect on their birthday.

A case from this Court, *Griffith v. State,* 654 So.2d 936 (Fla. 4th DCA 1995), *quashed on other grounds,* 675 So.2d 911 (Fla. 1996) is a direct parallel to the case at bar as far as the issue of ages, and the interplay between the Information and the verdict forms. This Court held in *Griffith,* "The verdict adds for each conviction 'as charged in the Information' but it does not specify the dates of the occurrences for the convictions. Informed by the rule of lenity, we are required by the particular language employed in the Verdict and the Information to assume that all of the convictions represented violations that occurred while the defendant was under the age of 16." (footnote in original) Appellant's situation is identical, the specified range of dates including times allowing different penalties and the

verdict form including the words, "as charged in the Information." (See Appellant's motion, pages 1-2) This Court held that in such situations, the rule of lenity requires the judge to give the lesser sentence.

Two more cases from this Court addressing ages and the rule of lenity are *Maitre v. State,* 770 So.2d 309 (Fla. 4th DCA 2000) (the rule of lenity requires the assumption that the offense occurred within the window period) and *Glynn v. State,* 868 So.2d 1280 (Fla. 4th DCA 2004) (a defendant is entitled to the "most lenient version of the guidelines in effect during the time frame alleged in the information."). Applying the holdings of this Court in cases like *Maitre* and *Glynn* and the holdings of other courts in cases like *Griffith* and *Velaquez* result in Appellant's convictions in Counts 1 and 2 being second degree felonies instead of life felonies, and Appellant should be resentenced accordingly.

The United States Supreme Court's decision in *Apprendi* also supports the argument the Appellant's convictions in Counts 1 and 2 should be viewed as second degree felonies instead of life felonies. The rule stated in *Apprendi* is that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi,* at 490. In *Schriro v. Summerlin,* 542 U.S. 348, 124 S.Ct 2519, 159 L.Ed 2d 442 (2004), it was determined that *Apprendi* does not apply retroactively to cases on collateral review. In the case at bar, however, Appellant's direct appeal was not final until his resentencing on August 9, 2002, well after the decision in *Apprendi* and so *Apprendi* was controlling when Appellant was [re]sentenced and the judge was precluded from making a presumption as to the age of the victim, when, according to Florida law, the Verdict Form and Information had not conclusively established it.

Appellant contends he is entitled to be resentenced

with Counts 1 and 2 as second degree felonies and prays this court to reverse the trial court's denial of his motion and remand for resentencing accordingly and withing the relevant sentencing guidelines.

CONCLUSION

Based on the foregoing facts and authority, the trial court's Orders of October 20, 2005 and December 12, 2005 should be reversed and either remanded back to the trial court to either grant relief of deny relief including court's rationale, or alternately, this Court should apply the law to the uncontested facts in the case and grant Appellant relief directly for the sake of judicial efficiency.

Respectfully submitted,

/s/_____

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CERTIFICATES OF FONT AND SERVICE

I HEREBY CERTIFY that the font the foregoing is reproduced in 14 point proportionally spaced Times New Roman and that a true and correct copy has been furnished by U.S. Mail delivery this 18th day of January, 2006 to the Office of the Attorney General - Criminal Appeals, 1515 N. Flagler Ave., Suite 900, West Palm Beach, FL 33401.

/s/_____

David W. Collins, Esquire

DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT
JULY TERM 2006

FILED
JUL 16, 2006

EDWARD FREDERICK,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D06-2061

[July 19, 2006]

PER CURIAM

Affirmed.

STEVENSON, C.J., GUNTHER AND HAZOURI, JJ., concur.

* * *

Appeal of an order denying rule 3.800(a) motion from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County, Krista Marx, Judge; L.T. Case No. 98-9283 CFA02

David W. Collins of Law Offices of David W. Collins, Monticello, for appellant.

No appearance required for appellee.

Not final until disposition of timely filed motion for rehearing.

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT, FLORIDA

FILED
AUG 3, 2006

EDWARD FREDERICK,
Appellant,

vs. Case No. 4D06-2061

STATE OF FLORIDA,
Appellee.

MOTION FOR REHEARING, MOTION FOR REHEARING *EN BANC*, MOTION FOR ISSUANCE OF A WRITTEN OPINION, AND MOTION FOR CERTIFICATION OF QUESTIONS OF GREAT PUBLIC IMPORTANCE

On July 19, 2006, this Court affirmed, without opinion, the decision of the court below in the above referenced cause. Pursuant to Rules 9.330(a) and 9.331, Fla.R.App.P., Counsel for Appellant respectfully moves this Court for a rehearing, rehearing *en banc*, issuance of a written opinion, and certification of questions of great public importance.

I
MOTION FOR REHEARING

On July 19, 2006, this Court *per curiam* affirmed the lower court's order of October 20, 2005, an order that summarily denied Appellant's 3.800 motion. Counsel for Appellant feels there are matters of fact and/or law which the panel may have overlooked in arriving at its decision, and states as follows:

This is not a complicated appeal for it addresses a one-line decision, the lower court having denied Appellant

saying simply that it would "not apply the rule set forth in *Velazquez* as the facts are clearly distinguishable here." (Trial court's Order of October 20, 2005).

Appellant's argument for relief was simple, that because the victim was both "under the age of 12," and "12 years of age," during the range of dates defined for his convictions in counts 1 and 2, it is not shown conclusively from the jury's verdict that the victim was "under the age of 12," when the crime(s) for which Appellant was convicted occurred and that this Court and the other district courts have consistently held that in such situations the rule of lenity controls and the age most favorable to Appellant must be presumed when sentencing.

To qualify for the relief this Court has granted to others in similar situations, Appellant needed only to show that the victim was 12 at some time during the range of dates defined in his convictions and cite cases showing how this Court and others handle such situations where a victim is both 12 years of age and under 12 years of age when the alleged crime took place. The bright line rule that the courts use to resolve such situations is the rule of lenity which requires the ambiguity be resolved in the manner most favorable to the defendant. Thus, we have two rules that apply in Appellant's situation, the birthday rule and the rule of lenity.

Appellant cited *Velazquez* in his motion simply to show how the courts of this land determine when a person attains his or her new age in relation to the person's birthday. Perhaps Appellant should never have mentioned *Velazquez* or anything about the birthday rule, and simply proceeded on the presumption that the court would accept that the victim was 12 on her 12th birthday. But, Appellant included *Velazquez*, which contained an interesting and thorough explanation of how the birthday rule originated from the common law of

England and how a person attains his or her new age at 12:01 AM on his or her birthday, and Appellant felt this would make his motion more interesting and therefore readable, plus it would eliminate any question as to the fact that his victim was 12 on her 12th birthday. Perhaps the panel can imagine Appellant's surprise when the lower court issued an opinion saying the birthday rule does not apply in his case, and then the panel affirms that. Certainly the panel can sympathize with Appellant's confusion. How can that be? How can the birthday rule not apply to Appellant's situation? The lower court says "distinguishing facts" would cause the birthday rule not to apply, but what facts would make the birthday rule not apply? Under what set of facts would a person not attain their new age at the very moment their birthday begins. In affirming the decision below, the panel appears to be saying that due to distinguishing facts, the victim in the case at bar was still 11 on her 12th birthday. When the panel and the lower court say the rule does not apply, that is the only thing it could mean. If that is not what the lower court meant, and that is not what the panel meant in affirming the decision below, then clarification is badly needed. Undersigned counsel would argue that the decision as presented by the lower court is contrary to the law and the affirmation of July 19, 2006 by the panel, if allowed to stand, would result in a decision that is contrary to the law of the land, and contrary to the cases cited by Appellant in his pleadings, and the decision of July 19, 2006 should be reconsidered and reheard by the panel.

Another alternative is that the lower court did not mean what is said but meant something else and the panel affirmed that something else. Clearly, an Appellant should not have to do this in trying to figure out why his motion was denied, but in the case at bar, it seems a more believable scenario than that the birthday rule

didn't apply to the victim in this case. Perhaps the panel and the lower court didn't mean that the birthday rule doesn't apply, but that it does in fact apply and the victim in the case at bar was in fact 12 years old on her 12th birthday, but due to differences in the facts in *Velazquez* and the facts in the case at bar, the fact that the victim was 12 on her 12th birthday has no significance where it did in *Velazquez*. If that is the case, then the issue isn't whether or not the victim in the case at bar was 12 on her 12th birthday, but whether the fact that she was 12 on her 12th birthday has any significant and if so, what?

This is where the rule of lenity comes in and is the reason Appellant raised it in his motion, although the trial court didn't address it in its denial. Appellant cited this Court's own case law, as well as that of other district courts, to show that when a crime is alleged to have been committed during a range of dates where the penalty would be different depending on where in that range the crime actually took place, the courts of Florida are bound by the rule of lenity to presume the date most favorable to the defendant.

In the past, this Court has consistently held that the rule of lenity, as laid out in Florida Statute § 775.021(1), is controlling in situations precisely like Appellant's and the rule requires the decision be made in the way most favorable to the defendant. *See e.g. Griffith v. State,* 654 So.2d 936, 938 (Fla. 4th DCA 1995), *quashed on other grounds,* 675 So. 2d 911 (Fla. 1996) (noting rule of lenity required assumption that, "all of the convictions represented violations that occurred while the defendant was under the age of 16."); *See also Maitre v. State,* 770 So.2d 309 (Fla. 4th DCA 2000).

The rule of lenity was not a rule mentioned in *Velazquez* because once the birthday rule was applied, the victim's age was clearly 12 during the entire time the offense was alleged to have happened and the rule of

lenity was not needed. The only rule needed to resolve *Velazquez* was the birthday rule. But Appellant's situation is different and two rules are needed to resolve the situation. Application of the birthday rule establishes that the victim was both 12 and under 12 during the time when the alleged offense(s) occurred and application of the rule of lenity is what the courts have historically used to resolve what age to use for sentencing purposes in such situations.

As we have seen, for the panel to affirm the decision below, it must either embrace a contention that the birthday rule does not apply, which would mean that the victim in Appellant's case was 11 years of age on her 12th birthday, ***OR*** that the birthday rule does apply – meaning the victim was 12 on her 12th birthday – but Florida Statute § 775.021(1), the rule of lenity, and this Court's own previous decisions in cases like *Griffith* and *Maitre* do not apply. Undersigned counsel doesn't believe it was the panel's intention to violate either rule or its own case law, as well as the case law of the other districts, and that is why a rehearing necessary.

If the panel does indeed acknowledge that the victim in this case was 12 on her 12th birthday and still embraces Florida Statute § 775.021(1), the rule of lenity, and its holdings in cases like *Griffith* and *Maitre* as good law, then Appellant is entitled to relief and the panel should rehear its decision of July 19, 2006. The only other alternative is that one of the rules does not apply, and that would be contrary to both statutory authority and existing case law.

Appellant would also point out that both of these points of law, the birthday rule and the rule of lenity, rise to the level of constitutional protections as they are affirmatively embraced in the federal courts and have been for a very long time. *See e.g. Smith v. Alabama,* 124 U.S. 465, 478 (1888) ("The interpretation of the Constitution of the United States is necessarily influenced

by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history."); *See generally R.F. Martin, Annotation, Inclusion or Exclusion of the Day of Birth in Computing One's Age,* 5 A.L.R.2d 1143 (1949); See also *In re Harris,* 855 P.2d 391, 408 (Cal. 1993)(In accordance with this principle, the common-law rule for determining a person's age is that a person reaches a given age at the earliest moment of the day before the anniversary of his birth.); *Bell v. United States,* 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955)(When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.); *Clark v. Martinez,* 125 S.Ct. 716, 160 L.Ed.2d 734 (U.S. 2005)(if a statute has criminal applications, "the rule of lenity applies" to the Court's interpretation of the statute).

Appellant feels that in light of the above, the panel should rehear its decision of July 19, 2006 affirming the lower court's decision of October 20, 2005.

II
MOTION FOR REHEARING EN BANC AND STATEMENT OF COUNSEL

Undersigned counsel expresses a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance because the panel's decision to affirm the decision below, necessarily means either the birthday rule does not apply – and the victim was in fact 11 years old on her 12th birthday – or that the birthday rule does apply (contrary to what the decision below held) – meaning the victim was in fact 12 years old on her 12th birthday – but that the rule of lenity, and this Court's own holdings in cases like *Griffith* and *Maitre* no longer apply. Such a decision would be in conflict with not only this Court's own decisions, but those of other district courts and the

supreme court as to the accepted points of both state and federal law that, 1) that a person attains his or her new age the moment his or her birthday begins, and 2) that the rule of lenity requires ambiguity to be resolved in a defendant's favor in criminal proceedings. If the panel's decision of July 19, 2006 is allowed to stand, the conflict would undermine the public's confidence in Florida's judicial system and the ability of a defendant to receive a fair review of alleged errors presented to this Court for review.

Appellant contends that this Court's decision of July 19, 2006 is in conflict with numerous previous decisions by both this Court and other district courts, as well as federal courts and the United States Supreme Court, including but not limited to the following:

Florida Statute 2.01 (1829 to present)(when no statute states otherwise, common law applies.)

Florida Statute 775.01 (1829 to present)(rule of lenity must be applied in Florida.)

Griffith v. State, 654 So.2d 936 (Fla. 4th DCA 1995)(rule of lenity must be applied in interpreting verdict.)

Velazquez v. State, 648 So.2d 302 (Fla. 5th DCA 1995)(birthday rule holds that person attains age at 12:01AM on birthday.)

Maitre v. State, 770 So.2d 309 (Fla. 4th DCA 2000)(rule of lenity requires assumption that offense occurred within range of dates at time most favorable to defendant.)

Glynn v. State, 868 So.2d 1280 (Fla. 4th DCA 2004)(defendant is entitled to the "most lenient version of the guidelines in effect during the time frame alleged in the information.")

Bundrage v. State, 814 So.2d 1133 (Fla. 2d DCA 2002)(the rule of lenity applies in sentencing.)

Bell v. United States, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955)(Judiciary should resolve ambiguity in favor of lenity.)

Clark v. Martinez, 125 S.Ct. 716, 160 L.Ed.2d 734 (U.S. 2005)(if a statute has criminal applications, "the rule of lenity applies" to the Court's interpretation of the statute.)

Smith v. Alabama, 124 U.S. 465, 478 (1888)(provisions are framed in the language of the English common law, and are to be read in the light of its history.)

Apprendi v. New Jersey, 530 U.S. 466 (2000)("[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.")

In light of the above, Appellant submits that the matter should be considered by the Court *en banc.*

III
MOTION REQUESTING ISSUANCE OF A WRITTEN OPINION

On July 19, 2006, this Court affirmed without opinion the decision of the court below in the above referenced cause. Counsel for Appellant, pursuant to Rule 9.330(a), Fla.R.App.P., hereby certifies, "I express a belief, based upon a reasoned and studied professional judgment, that a written opinion will provide a legitimate basis for supreme court review because [see reasons below]."

The panel *per curiam* affirmed the decision of the court below, a decision which cannot stand unless the panel finds either 1) that the victim in the case at bar

was in fact 11 years old on her 12th birthday, a holding that violates the common law birthday rule, and if such is the panel's contention then the Supreme Court would be likely to grant review because such would be a violation of the common law birthday rule if an opinion were written, or 2) if the panel accepts that the victim was, in fact, 12 years old on her 12th birthday, but then approves a decision by the trial judge during sentencing that interpreted the jury's verdict finding Appellant guilty as charged in the Information – an Information containing a range of dates that included times when the victim was 12 years of age and times when the victim was under 12 – in a manner not the most favorable to Appellant, the Supreme Court would be likely to grant review of such because it would be a violation of rule of lenity. Counsel for Appellant therefore respectfully requests a rehearing with issuance of a written opinion.

IV
MOTION FOR CERTIFICATION OF QUESTIONS OF GREAT PUBLIC IMPORTANCE

Because the decision below cannot stand unless it is determined that the victim was 11 on her 12th birthday, a violation of the common law birthday rule, or that the rule of lenity does not apply at sentencing, should the Court decide to allow it's decision of July 19, 2006 to stand, Appellant requests the following questions to be certified to the Florida Supreme Court:

I

DOES THE COMMON LAW BIRTHDAY RULE STILL APPLY IN FLORIDA AND IF SO, IS A PERSON 12 YEARS OLD ON HIS OR HER 12TH BIRTHDAY?

II

WHEN A DEFENDANT IS CONVICTED OF COMMITTING A CRIME DURING A TIME

PERIOD WHEN THE VICTIM WAS BOTH UNDER THE AGE OF 12 AND 12 YEARS OF AGE, AND THE SEVERITY OF THE PENALTY FOR THAT CRIME VARIES DEPENDING ON WHETHER THE VICTIM WAS UNDER THE AGE OF 12 OR 12 YEARS OF AGE, DOES THE RULE OF LENITY REQUIRE THAT THE SENTENCING JUDGE PRESUME THE AGE MOST FAVORABLE TO THE DEFENDANT?

Appellant's statements of questions to be certified is based on the decision rendered in the lower court on October 20, 2005 by the Honorable Krista Marx, Circuit Court Judge, Fifteenth Judicial Circuit in and for Palm Beach County, Florida, that decision being per curiam affirmed by this Court on July 19, 2006.

Respectfully submitted,

/s/
DAVID W. COLLINS, Esquire
Florida Bar No. 475289

Law Office of David Collins
310 North Jefferson Street
Monticello, Florida 32345
Phone: (850) 997-8111
Fax: (850) 997-5852

Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Appellant's Motion for Rehearing, Motion for Rehearing En Banc, Motion for Issuance of a Written Opinion, and Motion for Certification of Questions of Great Public Importance has been furnished by U.S. Mail delivery this 2nd day of August, 2006 to the Office of the Attorney General - Criminal Appeals, 1515 N. Flagler Ave., Suite 900, West Palm Beach, FL 33401.

/s/

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Attorney for Appellant

FOURTH DISTRICT COURT OF APPEAL
CASE DOCKET

Case Number: 4D06-2061

Final Criminal 3.800 Notice from Palm Beach County

EDWARD FREDERICK vs. STATE OF FLORIDA

Lower Tribunal Case(s): 98-9283 CFA02

11/25/2006 07:33

Date Docketed	**Description**
05/19/2006	Notice of Appeal Filed
05/19/2006	order appealed
05/19/2006	Initial Brief on the Merits
05/19/2006	Received Summary Record
05/19/2006	Request for Oral Argument
05/24/2006	Acknowledgement Letter
07/19/2006	Order Denying Oral Argument
08/03/2006	Affirmed - Per Curiam Affirmed
08/03/2006	Motion for Rehearing
08/03/2006	Motion for Rehearing EN BANC
08/03/2006	Miscellaneous Motion
08/03/2006	Motion Suggest to Cert. Cause to S.C.
08/28/2006	**ORD-Denying Rehearing**
08/28/2006	Order Denying Rehearing En Banc
08/28/2006	Deny Miscellaneous Motion
08/28/2006	Deny Certification of Cause to S.C.
08/28/2006	West Publishing
09/15/2006	Mandate
11/15/2006	Returned Records (No Record)

IN THE CIRCUIT COURT OF
THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

EDWARD FREDERICK
Defendant

FILED
MAR 17, 2005

~ vs ~

Case No. 98-9283-CFA02
Palm Beach County

STATE OF FLORIDA
Plaintiff

MOTION TO CORRECT ILLEGAL SENTENCE AND ERRORS IN SCORESHEET CALCULATIONS

COMES NOW Defendant, Edward Frederick, by and through his undersigned counsel and, pursuant to Florida Rules of Criminal Procedure 3.800(a), files this, his *Motion To Correct Illegal Sentence and Errors in Scoresheet Calculations* and in support thereof states as follows:

In a seven-count Information, Defendant was charged with two counts of sexual battery and five counts of lewd assault, the lone victim being the Defendant's minor stepdaughter. On October 6, 1999, after a trial by jury, Defendant was convicted "as charged in the Information" on counts 1, 2, 3, 5, and 7, and acquitted on counts 4 and 6. Defendant was sentenced on counts 1 and 2 to life in prison with a mandatory minimum 25 years, and on counts 3, 5, and 7, to 15 years, all sentences running concurrent.

Defendant filed a timely appeal and on August 9, 2002, as a result of that appeal, he was resentenced, his life sentences on counts 1 and 2 remaining the same, but receiving 67½ months on count 3, and 4½ years on each

of counts 5, and 7, all concurrent with each other and the sentences on counts 1 and 2.

On counts 1 and 2, the Information charged Defendant with committing upon "a person less than twelve years of age," acts defined in 794.011(1)(h),[1] the offense dates being alleged in the Information as "on or between December 31, 1991 and September 27, 1995," for count 1, and "on or between January 1, 1993 and September 27, 1995" for count 2. Counts 3 and 4 charged Defendant with the identical behavior, but alleging the occurrences as "on or between September 27, 1995 and May 31, 1997."

September 27, 1995, was the victim's 12th birthday. The penalties for the behavior alleged in counts 1, 2, 3 and 4 depends on whether the victim was under 12 or 12 or older, and because the range of dates alleged includes the victim's birthday, it is essential to this case to know precisely when the alleged victim became 12 according to the law in Florida.

The issue when a person attains age in regards to his birthday is examined in detail in *Velazquez v. State,* 648 So.2d 302 (Fla. 5th DCA 1995), a case very similar to the case at bar. The *Velaquez* court pointed out that:

> Chapter 794 of the Florida Statutes fails to define who is "a person less than 12 years of age" under section 794.011(2), however, section 2.01, Florida Statutes (1991), provides that the general common and statute laws of England in existence on July 4, 1776, remain in force in this state unless inconsistent with the Constitution and laws of the United States or with the acts of the Florida legislature.

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[1] These acts may or may not be sexual battery depending on a combination of other factors such as age and consent of victim.

Id.

The *Velazquez* court held that the common law rule controls in such cases.

> We conclude that under section 2.01 the common law controls in this case. . . . [t]he common-law rule regarding age does not recognize fractions of a day. . . . [t]he common-law rule for determining a person's age is that a person reaches a given age at the earliest moment of the day before the anniversary of his birth. . . . The underlying rationale for this rule is that a person is in existence on the day of his birth; thus, he has lived one year and one day on the first anniversary of his birth).[2]

Id.

According to "the common law rule," the victim in the case at bar became 12 years of age at 12:01AM on September 26, 1995, and therefore the range of dates during which counts 1 and 2 were alleged to have happen, includes two days when the alleged victim was no longer under the age of 12.[3]

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[2] *See also In re Forfeiture of 1978 Chevrolet Van,* 493 So.2d 433, 436-37 (Fla. 1986).

[3] The *Velazquez* court also discussed "the birthday rule," which holds that a person attains a given age at 12:01 AM on the anniversary of their birthday. *Id.* ("Like the common-law rule, the birthday rule does not recognize fractions of a day; thus, under the birthday rule a person attains a given age at 12:01AM or at the beginning of the anniversary date of the person's birth."). According to "the birthday rule," the alleged victim in the case at bar became 12 years of age at 12:01AM on September 27, 1995.

Velazquez is on point with the case at bar not only in how a person's age is calculated according to the Florida law, but because its analysis and application of its findings were in a case involving charges of capital sexual battery and the element of time, just like in the case at bar. In *Velazquez,* the defendant was charged with two counts of capital sexual battery occurring on June 5, 1992. The state presented evidence that the victim was born at 3:49 PM on June 5, 1992, and the alleged capital sexual batteries occurred "around noon or one o'clock" on that date and thus the victim was under 12. Based on that evidence, the jury found Velazquez guilty. On appeal, Velazquez's two capital sexual batteries convictions were overturned because when "the common law" rule was used to define when the victim turned 12, the information and jury's verdict did not make a showing of the offensive behavior occurring conclusively when the victim was "under 12."

Velazquez is directly on point with the case at bar, where the offensive behavior alleged in counts 1 and 3, and in counts 2 and 4 is a capital sexual battery only when the victim is under the age of 12[4] and is a second degree felony when the victim is twelve or older, but under sixteen.[5]

The Florida Supreme Court has held that a determination that the victim is under 12 is an "aggravating factor" during sentencing, increasing the penalty from a statutory maximum of 15 years to Life in prison with a mandatory 25 years.[6]

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[4] See 794.011(2)(a), Fla. Stat., (1991, 1993)

[5] See 800.04(3), Fla. Stat., (1991, 1993)

[6] Lewd and Lascivious Act is not a lesser included offense of Capital Sexual Battery. *Welsh v. State,* 850 So.2d

The Information and Verdict Form for counts 1 and 2 in the case at bar identified the crimes charged as sexual battery on a person under the age of 12, just as they did in *Velazquez*, and in counts 3 and 4 as lewd assault on a person under the age of 16. The jury instructions for counts 1 and 2 included that the it must be found that the victim was under the age of 12 at the time, and just like in *Velaquez*, the jury was not instructed as to how to calculate when a victim turns 12 according to Florida law, and thus is no longer "under 12." The jury in the case at bar, like in *Velaquez*, found the Defendant "guilty as charged in the Information," based on inadequate information. Applying the holding in *Velaquez* to the case at bar, it cannot be concluded that the offensive behavior the jury found Defendant "guilty as charged in the Information," didn't occur on the two days during the range of dates alleged when the victim was not "under 12," September 26, 1995 and September 27, 1995.

The Verdict Form contained for the convictions on counts 1 and 2, "Guilty of Sexual Battery on a Person Less than 12 Years of Age, as charged in the Information." Relevant here is inclusion of the phrase, "as charged in the Information," which contractually makes the Information part of the verdict. As has been shown above, the Information contains dates when the

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467 (Fla. 2003) The determining factor as to whether the offensive behavior is a lewd and lascivious act or capital sexual battery is solely the age of the victim at the time of the offense. Neither is sexual battery a lesser included offense of capital sexual battery. Capital sexual battery requires proof that the victim was 12 years of age or younger while sexual battery contains the element of lack of the victim's consent.

alleged victim was not "a person less than 12 years of age." Since the penalty for the behavior alleged in counts 1 and 3 is Life in prison with a mandatory 25 years if the victim is under twelve, but a statutory maximum of 15 years if the victim is twelve or over, but under sixteen, and the same applies to counts 2 and 4, a question arises as how Florida law is applied to this situation.

A case on point is *Griffith v. State,* 654 So.2d 936 (Fla. 4th DCA 1995), *quashed on other grounds,* 675 So.2d 911 (Fla. 1996), holding that in such cases, the rule of lenity controls.[7] The Fourth District Court of Appeal in *Griffith*, held:

> The facts in this case are simple. Defendant was born 25 August 1967. On 15 December 1989, he was charged by Information with 14 felonies: 10 counts of sexual battery and 4 counts of lewd assault. The Information alleged that all of the violations occurred "on one or more occasions between" 2 August 1983 and 1 August 1985. The jury convicted him of 3 counts of sexual battery and 2 counts of lewd assault. The verdict adds for each conviction "as charged in the Information" but it does not specify the dates of the occurrences for the convictions. Informed by the rule of lenity, we are required by the particular language employed in the Verdict and the Information to assume that all of the convictions represented violations that occurred while the defendant was under the age of 16.

Id. (internal footnotes omitted)

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[7] See 775.021, Fla. Stat. (1993)

Because the penalty for the offenses in *Griffith*, was greater for an adult than it was for a juvenile, the question became like in the case at bar, which penalty would apply and it was held that because Griffith was found guilty "as charged in the Information," what was contained in the Information must be interpreted using the rule of lenity. When the same is done in the case at bar, it must be presumed that the victim was not "a person less than twelve years of age," but one who has already turned 12 according to Florida law.

No significance can be attached to the fact that Defendant's Information included a reference to Florida Statute 794.011(2)(a), and not 800.04(3), because it is the allegations that the elements of a crime occurred that define what a defendant is charged with. *Mosely v. State,* 688 So.2d 999(Fla. 2nd DCA 1997) (The state concedes that the information contains a scrivener's error regarding the correct subsection of the statute. An erroneous reference to the statute in the information is not fatal to conviction if the information properly pleads the necessary elements of the offense.); *B.H. v. State,* 645 So. 2d 987 (Fla. 1994), *cert. denied,* U.S., 115, S. Ct. 2559, 132 L. Ed. 2d 812 (1995); *Danzy v. State*, 603 So. 2d 1320 (Fla. 1st DCA 1992). *See also Janes v. State,* 585 So. 2d 424 (Fla. 1st DCA 1991).

Significant is that the Fourth District Court of Appeal in *Griffith*, utilizes only what is contained in the Information and the Verdict Forms, making no mention of evidence and/or jury instructions. Although not explained in *Griffith*, it would appear to be because it is the Verdict Form that contractually controls what a defendant is guilty of, in conjunction with the contents of the Information when such is included through the reference, "as charged in the Information." Were this not the case, in the case at bar, there might be a temptation to draw into the discussion the fact that the jury was instructed that to find the Defendant guilty of

counts 1 and 2, they must find that the victim was under the age of 12. An argument could then be made that because they found Defendant guilty of counts 1 and 2, and they were instructed they could do so only if they found the victim was under the age of 12, such might be argued is sufficient to show that, for sentencing purposes, it was the jury, not the judge who made the decision that the victim was under 12. This argument is flawed in at least three ways.

First, as has been discussed in detail above, the jury was never instructed as to when the victim turned 12 according to Florida law, which is significant considering how such is calculated in Florida according to the common law of England over two hundred years ago. Second, the holding in *Griffith* specifically excludes such from decisions on such a question, relying instead only on the Verdict Form and the Information when referenced in the verdict.

Third, in the case at bar, the jury was instructed in count 4 that if they found the behavior specified in counts 2 and 4 occurred when the victim was under the age of 16, they must find him guilty. The jury found Defendant not guilty on count 4. Therefore, if we take the fact that the jury found the behavior in counts 2 and 4 did not occur when the victim was under 16, it would nullify count 2, because that count involves the exact same behavior when the victim was under 12, and when she victim was under 12, she was also under 16. So clearly, the evidence, the jury instructions and conjecture as to what the jury might have been thinking is precluded and it is the Information and the Verdict Form that control.

Another case that controls what sentence Defendant can receive in the case at bar is *Apprendi v. New Jersey,* 530 U.S. 466 (2000). As has been presented above, according to Florida law, there is no conclusive finding as to the age of the victim when the offensive

behavior alleged in counts 1 and 2 occurred according to the Verdict Form and the referenced Information. When Defendant was sentenced, the court embraced a presumption that the victim was, in fact, under 12, and sentenced Defendant to a greater penalty, that of Life in prison, with a mandatory 25 years on each of the two counts. This greatly exceeds the statutory maximum of what Defendant could have received had the victim been 12. The judge thus, unknowingly, made a decision as to an aggravating factor for the purpose of sentencing on counts 1 and 2, finding as fact something that was not conclusively found by the jury as evidenced by the Verdict Form and the Information, and using that fact to increase the sentence Defendant faced from a statutory maximum of 15 years to life in prison. Even if the judge might have thought that a preponderance of the evidence justified such a decision, the United States Supreme Court held in *Apprendi* that a judge cannot make such a decision.

The rule stated in *Apprendi* is that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi,* at 490. The wrong to be avoided here is a defendant being denied his Sixth Amendment right to a jury trial when the maximum of the legally authorized sentence is increased due to factors found by the judge. It is the jury who must make these decisions using the "beyond a reasonable doubt" standard and not a judge using the "preponderance of the evidence" standard.

In *Schriro v. Summerlin,* 542 U.S. ___; 124 S.Ct 2519; 159 L.Ed 2d 442 (2004), it was determined that *Apprendi* does not apply retroactively to cases on collateral review. In the case at bar, however, Defendant's direct appeal was not final until his resentencing on August 9, 2002, well after the decision

in *Apprendi* and so *Apprendi* was controlling when Defendant was [re]sentenced and the judge was precluded from making a presumption as to the age of the victim, when, according to Florida law, the Verdict Form and Information had not conclusively established it.

Although Defendant's counsel made no objection, Florida law has determined that this issue can be raised via a rule 3.800(a) motion to correct illegal sentence without preservation. *Hughes v. State,* 826 So.2d 1070 (Fla. 1st DCA 2002) (We note initially that rule 3.800(a) is an appropriate procedural vehicle for raising an *Apprendi* claim, since such a violation would produce a sentence in excess of constitutional and statutory maximums and would be apparent from the face of the record. *See State v. Mancino,* 714 So. 2d 429 (Fla. 1998)).

WHEREFORE, Defendant should not have been sentenced to life in prison, with a mandatory 25 years, on counts 1 and 2 but should have received no more than the statutory maximum of 15 years for such offenses when according to the Verdict Form and Information, there has not been a conclusive showing of the victim being a person under twelve years of age. Defendant hereby requests this court to vacate his illegal sentences on counts 1 and 2, and resentence him based on a correctly calculated rule 3.988(b) scoresheet, in accordance with the holding in *Apprendi* and the authority cited above.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *Motion to Correct Illegal Sentence and Errors in Scoresheet Calculations*, has been furnished by U.S. Mail delivery this 15th day of March, 2005 to: Office of the State Attorney, 401 North Dixie Highway, West Palm Beach, Florida 33401

/s/

DAVID W. COLLINS, Esquire
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Florida Bar No. 475289

Attorney for Defendant

VELAZQUEZ V. STATE, 648 SO.2D 302 (FLA. 5TH DCA 1995)

COURT OF APPEAL OF FLORIDA,
FIFTH DISTRICT

No. 93-1883

JULIAN MAX VELAZQUEZ,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

Filed: January 6, 1995.

Appeal from the Circuit Court for Orange County, Richard F. Conrad, Judge. This Opinion Substituted on Denial of Rehearing for Withdrawn Opinion of November 10, 1994.

Raymond L. Goodman, Orlando, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Kristen L. Davenport, Assistant Attorney General, Daytona Beach, for Appellee.

Diamantis, J., Harris, C.j. and Thompson, J., concur.

Author: Diamantis

ON MOTION FOR REHEARING

DIAMANTIS, *J.*

We deny rehearing but withdraw the prior opinion and issue the following in its place.

Julian Velazquez appeals the judgments and sentences in four cases in which he was convicted of multiple sexual offenses involving children. Although Velazquez raises several issues on appeal, only one possesses merit.

Specifically, in case number CR 92-6394, we are constrained to reverse Velazquez's convictions for two counts of capital sexual battery upon a person less than twelve years of age because the victim was not less than twelve years of age on the date of the offenses.

The information in case number CR 92-6394 charged Velazquez with two counts of capital sexual battery in that:

> JULIAN VELAZQUEZ, a person eighteen (18) years of age or older, on the 5th day of June, 1992, in said County and State, did, in violation of Florida Statute 794.011(2), commit a sexual battery upon [the victim], a person less than twelve (12) years of age, and in furtherance thereof JULIAN VELAZQUEZ did with his mouth have union with the penis of [the victim].

Section 794.011(2) provides that:

> A person 18 years of age or older who commits sexual battery upon, or injures the sexual organs of, *a person less than 12 years of age* in an attempt to commit sexual battery upon such person commits a capital felony, punishable as provided in ss. 775.082 and 921.141. . . .

§ 794.011(2), Fla. Stat. (1991)(emphasis added).

Velazquez filed a pretrial motion to dismiss both capital sexual battery counts on the ground that the victim was not "a person less than 12 years of age" because the victim's twelfth birthday was June 5, 1992, the same day the sexual batteries occurred. The state filed a traverse asserting that the victim was less than twelve years of age at the time of the offenses because the offenses occurred prior to 3:49 p.m. on June 5, 1992, and the victim was born at 3:49 p.m. on June 5, 1980. At the hearing on the motion to dismiss, the state asserted that the offenses occurred "around noon or one o'clock."[1]

The trial court denied Velazquez's motion to dismiss, concluding that, because the victim's birthday was June 5, 1980, "as long as the alleged conduct occurred on or before June 5, 1992 the alleged criminal activity falls within the ambit of this statute." The trial court erred in so ruling.

Chapter 794 of the Florida Statutes fails to define who is "a person less than 12 years of age" under section 794.011(2); however, section 2.01, Florida Statutes (1991), provides that the general common and statute laws of England in existence on July 4, 1776, remain in force in this state unless inconsistent with the Constitution and laws of the United States or with the acts of the Florida legislature. *See In re Forfeiture of 1978 Chevrolet Van,* 493 So.2d 433, 436-37 (Fla. 1986). In this case, because of the absence of any statutory law on this point, we must consider the common law in determining the victim's age at the time of the offenses. *See Cate v. Oldham,* 450 So.2d 224, 225 (Fla. 1984). See also *State v. Brown,* 443 S.W.2d 805, 807 (Mo. 1969).

In order to avoid disputes, the common-law rule regarding age does not recognize fractions of a day. See *In re Harris,* 5 Cal. 4th 813, 855 P.2d 391, 409 (Cal. 1993); *People v. Anderson,* 108 Ill. App. 3d 563, 439 N.E.2d 65, 71, 64 Ill. Dec. 136 (Ill. App. Ct. 1982); *Parker v. State,* 61 Md. App. 35, 484 A.2d 1020, 1021-22 (Md. Ct. Spec. App. 1984); *State v. Brown,* 443 S.W.2d 805, 806 (Mo. 1969); *Ellingham v. Morton,* 116 A.D.2d 1032, 498 N.Y.S.2d 650, 651 (N.Y. App. Div.), *appeal denied,* 494 N.E.2d 112 (N.Y. 1986); *State v. Clark,* 84 Ohio App. 3d 789, 618 N.E.2d 257, 258 (Ohio Ct. App. 1993); *Commonwealth v. Iafrate,* 527 Pa. 497, 594 A.2d 293, 294 (Pa. 1991).[2] Under the common-law rule a person is deemed to have been born on the first minute of the day of his birth. *See Harris,* 855 P.2d at 409. In accordance with this principle, the common-law rule for determining a person's age is that a person reaches a

given age at the earliest moment of the day before the anniversary of his birth. *See Harris,* 855 P.2d at 408; *Parker v. State,* 484 A.2d at 1022; *State v. Brown,* 443 S.W.2d at 807; *Ellingham v. Morton,* 498 N.Y.S.2d at 651; *Commonwealth v. Iafrate,* 594 A.2d at 294. *See generally R.F. Martin, Annotation, Inclusion or Exclusion of the Day of Birth in Computing One's Age,* 5 A.L.R.2d 1143 (1949). The underlying rationale for this rule is that a person is in existence on the day of his birth; thus, he has lived one year and one day on the first anniversary of his birth. *See Harris,* 855 P.2d at 408 (*citing State v. Alley,* 594 S.W.2d 381, 382 (Tenn. 1980)).[3]

While we conclude that under section 2.01 the common law controls in this case, we note that the modern trend is to adopt what has been described as the more commonsense rule that a person attains a certain age on that person's corresponding birthday. *See Harris,* 855 P.2d at 409-11; *Ellingham v. Morton,* 498 N.Y.S.2d at 651; *Commonwealth v. Iafrate,* 594 A.2d at 295. Like the common-law rule, the birthday rule does not recognize fractions of a day; thus, under the birthday rule a person attains a given age at 12:01 a.m. or at the beginning of the anniversary date of the person's birth. *See Harris,* 855 P.2d at 409-11; *Ellingham v. Morton,* 498 N.Y.S.2d at 651. *See also Parker v. State,* 484 A.2d at 1022; *State v. Clark,* 618 N.E.2d at 258.[4] Some state legislatures have preempted the common-law rule by enacting statutes which adopt the birthday rule. *See Harris,* 855 P.2d at 408.[5]

Here, Velazquez's motion to dismiss should have been granted because, under either the common-law rule or the birthday rule, the victim turned twelve before noon on June 5, 1992, the time the state alleged that the offenses occurred. Under the common-law rule, the victim turned twelve at the earliest moment on June 4, 1992, and under the birthday rule, the victim turned twelve at 12:01 a.m. on June 5, 1992.[6]

In the event of our reversal of Velazquez's convictions under section 794.011(2), the state has requested that we enter judgments of conviction against Velazquez for the lesser offense of "sexual battery upon a person 12 years of age or older, without that person's consent." See § 794.011(5), Fla. Stat. (1991). In order for this court to grant this request, section 794.011(5) must be a necessarily lesser-included offense of section 794.011(2); i.e., all of the elements of section 794.011(5) must also be elements of section 794.011(2). See *Gould v. State,* 577 So.2d 1302 (Fla. 1991). *See generally Brown v. State,* 206 So.2d 377 (Fla. 1968). Because section 794.011(5) contains the additional element of lack of the victim's consent, the offense defined in that statute is not a necessarily lesser-included offense of section 794.011(2). Accordingly, we must deny the state's request to enter judgments of conviction under section 794.011(5). We also conclude that we cannot enter judgments of conviction for lewd, lascivious, or indecent assault or act upon or in the presence of a child under the age of sixteen years as set forth in section 800.04, Florida Statutes (1991), because section 800.04 is not a necessarily lesser-included offense of section 794.011(2). *State v. Hightower,* 509 So.2d 1078 (Fla. 1987).[7]

Accordingly, we vacate Velazquez's two convictions for capital sexual battery. In all other respects, we affirm Velazquez's convictions and sentences.[8]

AFFIRMED in part; REVERSED in part.

HARRIS, C.J. and THOMPSON, J., concur.

Disposition

AFFIRMED in part; REVERSED in part.

Opinion Footnotes

[1] At trial, the state introduced evidence that the offenses occurred between 9:00 a.m. and 11:30 a.m.

[2] "In the space of a day all the twenty-four hours are usually reckoned, the law generally rejecting all fractions of a day, in order to avoid disputes." 2 William Blackstone, Commentaries n* 141 (emphasis in original). Although courts have made exceptions to this common-law rule, such as in cases involving priorities of deeds or liens filed on the same day, courts generally have not applied such exceptions in criminal cases. *Parker v. State,* 61 Md. App. 35, 484 A.2d 1020, 1022 (Md. Ct. Spec. App. 1984); *State v. Brown,* 443 S.W.2d 805, 806 (Mo. 1969). *See also Crawford v. Feder*, 27 Fla. 523, 525, 8 So. 642, 642 (1891) ("[A] day is regarded as an indivisible point of time, . . . the law taking no notice of fractions of a day except in questions of priority of rights, or conflicting rights") (citations omitted). In this regard, we note that the Florida Supreme Court did not apply such an exception in *Savage v. State,* 18 Fla. 970 (Fla. 1882), a case relied upon by the state in the present case.

[3] In *Commonwealth v. Iafrate,* 527 Pa. 497, 594 A.2d 293 (Pa. 1991), the court discussed the genesis of the common-law rule:

> . . . The rule that a person reaches a given age on the day preceding the anniversary of his birth can be traced to seventeenth century England. See *Nichols v. Ramsel,* 86 Eng.Rep. 1072 (K.B.1677); *Herbert v. Turball,* 83 Eng.Rep. 1129 (K.B.1663). See also 1 W. Blackstone, Commentaries n* 463 ("So that full age in male or female is twenty one years, which age is completed on the day preceding the anniversary of a person's birth ..., who till that time is an infant and so styled in law ..."); [citation omitted]. The rule developed as an exception to the general rule of the common law for computation of time which excluded

> the first day and included the last. . . The exception was a fiction introduced in the law apparently because the common law took no notice of fractions of a day . . . . *United States v. Tucker*, 407 A.2d 1067, 1070 (App.D.C.1979) (citations omitted). *Iafrate*, 594 A.2d at 294-95.

[4] The modern practice is to look to a person's date of birth and not the hour of birth in determining the legal age for matters such as voting, driving an automobile, and drinking alcoholic beverages. *See State v. Clark*, 618 N.E.2d at 258.

[5] For example, the California legislature enacted a statute which calculates the age of majority from the first minute of the day on which a person is born to the same minute of the corresponding day on which the period of minority is completed. *Harris*, 855 P.2d at 408.

[6] The state contends that the trial court properly denied Velazquez's motion to dismiss on the authority of *Savage v. State*, 18 Fla. 970 (Fla. 1882), wherein the Supreme Court applied the common-law rule for computing time to hold that, in determining whether a criminal prosecution is barred by the statute of limitations, courts exclude the date the offense was committed and include the last day of the limitations period. Thus, the court concluded that a criminal indictment filed December 13, 1880, was not barred by the two-year statute of limitations where the offense was committed on December 13, 1878. The holding of *Savage* does not support the state's position in this case because, as noted in *Commonwealth v. Iafrate*, 527 Pa. 497, 594 A.2d 293, 294-95 (Pa. 1991), the common-law rule for determining a person's age developed as an exception to, and is different from, the common-law rule for computing the time in which an act must be performed. See supra note 3.

[7] On the other hand, if the evidence adduced at trial can support a jury verdict of lewd and lascivious assault as set forth in section 800.04, then a trial court, if requested, must give an instruction on such offense as a permissive lesser-included offense of sexual battery under section 794.011(2). *See King v. State,* 642 So.2d 649 (Fla. 2d DCA 1994).

[8] On appeal, Velazquez also contended that the trial court erred in denying his motion to suppress items seized from boxes which Velazquez left in a storage room at a friend's residence. Law enforcement officers searched the boxes and seized the items after the friend consented in writing to a search of the storage room and its contents. We agree with the trial court's ruling that Velazquez's friend had authority to consent to such a search and that Velazquez had no expectation of privacy in his friend's residence. See *United States v. Matlock,* 415 U.S. 164, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974). *See also Von Eichelberger v. United States,* 252 F.2d 184 (9th Cir. 1958); *Johnson v. State,* 519 So.2d 713 (Fla. 1st DCA 1988).

We also have considered Velazquez's contentions regarding the adequacy of the notice and the admissibility of evidence of other offenses committed by Velazquez against a different child under factually similar circumstances, and we find no merit in these contentions. *See State v. Rawls,* 19 Fla. L. Weekly S549 (Fla. Oct. 27, 1994). We likewise find no merit in Velazquez's contention that the trial court abused its discretion in limiting Velazquez's cross-examination of the victim's mother. The trial court permitted Velazquez to cross-examine the victim's mother regarding false accusations that the victim made against the mother, but the court properly prohibited Velazquez from inquiring into false accusations made by other persons against the victim's mother.

* * * * *